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In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, *Appellant,*

v.

JAMES J. CARROLL

On Appeal from the United States District Court for the
Western District of Missouri

STATEMENT AS TO JURISDICTION

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Criminal No. 18188

UNITED STATES OF AMERICA

v.

JAMES J. CARROLL

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The oral opinion of District Court which states the grounds for dismissing the indictment has not

been reported. A copy of the transcript thereof is attached hereto as an appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on August 11, 1952. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment, when such dismissal is based on the construction of the statute upon which the indictment is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rule 37(a)(2), Federal Rules of Criminal Procedure. The following decision sustains the jurisdiction of this Court: *United States v. Gilliland*, 312 U. S. 86, 89. See also *United States v. Foster*, 233 U. S. 515, 523.

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QUESTION PRESENTED

Whether the wilful failure to file each individual Information Return on Treasury Form 1099 as required by regulations issued under the authority of Section 147 of the Internal Revenue Code is a separate offense punishable under Section 145(a) of the Internal Revenue Code.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

Sec. 145[as amended by Sec. 5(c), Current Tax Payment Act of 1944, c. 120, 57 Stat. 144]. PENALTIES.

(a) Failure to file Returns, Submit Information, or Pay Tax.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

Sec. 147 [as amended by Sec. 202(c)(3), Revenue Act of 1948, c. 168, 62 Stat. 110]. INFORMATION AT SOURCE.

(a) Payments of \$600 or More.—All persons, in whatever capacity, acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of rent, salaries,

wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits, and income (other than payments described in section 148(a) or 149) of \$600 or more in any taxable year, or, in the case of such payments made by the United States, the officers or employees of the United States having information as to such payments and required to make returns in regard thereto by the regulations hereinafter provided for, shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payments.

(26 U.S.C. 1946 ed., Sec. 147.)

STATEMENT

85 An indictment in 101 counts was returned against the defendant in the United States District Court for the Western District of Missouri on December 14, 1951. Each count charged a failure of the defendant to file Information Returns on Treasury Department Form 1099 showing payments in excess of \$600 to the respective individuals named in each

count. The several counts allege that the defendant was required by the provisions of Sec. 147 of the Internal Revenue Code and Treasury Regulations 111, Sec. 29.147-1, as amended, to make a return in each instance to the Commissioner of Internal Revenue, Process Division, CC Station, Kansas City, 2, Missouri, setting forth in each instance the amount of the payment and the name and address of the recipient.

The defendant moved to dismiss the indictment, contending that it was in part barred by the statute of limitations, and that its several counts do not state offenses within the purview of Sec. 145(a) of the Internal Revenue Code.

The district court dismissed the indictment in its entirety, stating orally that Treasury information returns Forms 1099 were not returns within the meaning of either Sec. 145(a) or 147(a) of the Internal Revenue Code, but were merely attachments or components of Treasury Return Form 1096. Treasury information return Form 1096 is an "Annual Information Return" and is a summary of reports of income payments of \$600 or more by the person required to file the return. Treasury Regulations provided (Reg. 111, Sec. 29.147-1) that Information Forms 1099 shall be provided in accordance with the instructions on Form 1096 and attached to 1096 for filing on or before February 15th of the succeeding year. The district court concluded that Congress did not in-

tend that each separate failure to fill out Form 1099 should be made a separate offense but that only one offense could occur by virtue of a failure to file a Form 1096, or a failure to file that form with the proper attachments. The court stated that a maximum of one offense a year could be charged regardless of the number of payments or payees involved.

THE QUESTION IS SUBSTANTIAL

The issue presented in this appeal is one of obvious importance in the administration of federal income tax laws because the district court's construction of Sections 145(a) and 147 of the Internal Revenue Code limits their application to the possibility of one offense per year in regard to returns which, as in this instance, involve repeated delinquencies. It is apparent that Treasury Information Return Form 1099 is a return within the meaning of Section 147. Cf. *McDonough v. Lambert*, 94 F. 2d 838, 841 (C.A. 1st). The purpose of such a return is to provide separate informational reports of payments of the character defined in the statute. Form 1096 on the other hand is merely a summary and a means of transmittal for the primary Form 1099 returns. The latter returns each contain the data that is important and material to the "computation, assessment or collection," of the taxes imposed by Chapter 1 of the Internal Revenue Code. Each provides a means of testing the accuracy of the returns of the payees named. It is,

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accordingly, most important that the statutory purpose of Sec. 147 of the code, as implemented by the Treasury Department's regulations, should not be defeated by a construction of Sec. 147, together with Sec. 145(a) of the Internal Revenue Code, which would require all defaults in the preparation of the crucial information returns to be lumped as a single offense.

The Government contends that the Treasury Department could have required the separate submission of returns on Form 1099. The provision, for the convenience of the person required to file the return, that each 1099 form be submitted with still another type of return, i.e., Form 1096, does not consolidate these separate informational reports into a single return. As this Court stated in

Commissioner v. Lane-Wells Co., 321 U. S. 87, 219, 223, "Congress has given discretion to the Commissioner to prescribe by regulation forms of returns and has made it the duty of the taxpayer to comply. * * * The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished. For such purposes the regulation requiring two separate returns for these taxes was a reasonable and valid one and the finding of the Board of Tax Appeals that the taxpayer is in default is correct".

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

ROBERT L. STERN

Robert L. Stern

Acting Solicitor General

SEPTEMBER, 1952

(Filed in the U. S. District Court September 8, 1952.)

88 IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 18188

UNITED STATES OF AMERICA, *Plaintiff,*

v.

JAMES J. CARROLL, *Defendant.*

Transcript of the Court's Remarks in Passing Upon Defendant's Motion to Dismiss Before Honorable Richard M. Duncan, District Judge, August 11, 1952

THE COURT:

"With a possible exception of one or two matters ruled on here, the Court has given this matter a great deal of thought. It has been here a long time and I have walked around with this thing on my mind a lot because it presented some unusual questions.

"It arose in a rather unusual manner in its inception. That is none of the Court's business at this time, however, but there are some questions of law that I have constantly had in mind in connection with certain other cases that I have had.

"In the first place, gentlemen, I am going to disagree with both of you rather sharply. I think usually when the Court disagrees sharply with both sides, the Court is likely to be right. So that is going to be the Court's position here.

"As I stated this morning, I do not believe that it was the intention of Congress that the failure to report each item required by the statute rates a separate and distinct crime. The statute says that a person paying an amount in excess of \$600 for certain things should be reported on or by the 15th of February of each year. I think that it was the

intention of the statute that a return should
89 be made containing that information. I

think that Form 1096 is the form that is anticipated required by the statute and that the information which has been described here as being required in Form 1099 as a part of 1096. I don't think they are separate and distinct. I think that it is one. I think that 1096 is the one that the law requires and that the information contained in 1099 must be made a part of 1096. I think if that information is not contained in 1096, that the person who is required to file the form might be indicted for making a false return and not for a separate and distinct offense. Now those are two things.

"I think that the failure to file each item, that is as in this case it is alleged—or whether it is alleged or not, it is common knowledge—that it is the charge that the money paid here went to persons who had won in games of chance and there were a great many of them, and it is the Court's thought that each one of those does not constitute a separate offense, but that all of them should have

been included in Form 1096. If they were not, then after the form was filed, it would have been an offense for making a false return and then, pursuing that just a bit further, the Government has the authority under the statute to resort, may we say, to the Rules of Discovery, to get that information, to come into a court of equity and require that it be done, but I will get into that a bit later.

"For that reason, I think as I stated this morning, I was thoroughly convinced that the first indictment, 18,188, would as to all counts except one for each year, have to be dismissed.

"In view of what has transpired here, I must go further and hold that the indictment itself must be dismissed because, in the opinion of the Court, it is not a violation of the law to fail to file under Form 1099, but it is a violation to fail to file 1096.

"So it will be the ruling of the Court that the *Motion to Dismiss as to 18,188 will be sustained.*"

90 "We next come to 18,189. Now, gentlemen, I may be wrong. I am often wrong. The Court of Appeals has repeatedly said so, but I am still trying.

"The question of venue under our modern practice and theory of government is becoming a most serious one and I think all who think economically as well as legally in this complicated age must realize that we are living in a new and complicated age.

"The income tax laws are probably among the most complicated that are upon the statute books. You will pardon ~~any~~ personal reference. It is not anything new, but I either had the privilege or the misfortune, whichever it may have been, to have served for eight years on the Ways and Means Committee in the Congress and on the subcommittee writing tax bills, and the head of the drafting service I think probably knew more federal law and federal statutes than any other man in the United States. I remember one day after spending days and days with all the experts from the Treasury Department and the Internal Revenue Department and our own staff, the Joint Committee worked out some theory that should go into the law. It came back in language which none of us could understand. We asked him about it and he smiled one of his rare smiles and said, 'Well, you know we live in the most complicated government in the world and when you try to put within 150 or 200 pages all of the conditions necessary to the collection of taxes in this country, you are going to have to use some complicated language or you won't collect the taxes. The fellows on the outside are working harder to keep from paying them, not criminally, but just protecting themselves, than they are on the inside trying to collect them.' And that was not a reflection on anybody. Of course, it is necessary to make rules and regulations.

"Following that statement through, if you didn't confer upon the Internal Revenue Depart-

ment and the Treasury Department the rule making authority to make rules and regulations with respect to the collection of taxes, that tax bill would have to have probably 1,000 pages instead of 150 or 200. So naturally, authority has been conferred to make reasonable rules and regulations within the four corners of the law itself, and when they go beyond that, then they are not reasonable rules and regulations, and I think the Court has a perfect right to disregard them. It would be illegal if they were not within the four corners of the law itself, and I am not saying that the ones here are not. I think they are.

“But the question of venue comes again not only in the collection of revenues, but in the enforcement of many other of our modern laws to meet modern conditions. They have set up zones, districts within which the law is to be administered. My own personal view, as a lawyer and as a judge, that the venue laws ought not to be changed as a result of those rules and regulations. I don't think it is right legally. I disagree with my judicial brethren who are my superiors in these matters. I do not think it is right that a man from St. Louis should be brought to Kansas City to answer to the law. I do not think a man from Kansas City should be required to go to New York to defend against some violation of the law. I think

91 it ought to be prosecuted in the place where he lives as it is in almost every other in-

stance. There are a few others where the violation has occurred in two or three different states, or it is a continuing one, such as the violation of the Postal Regulations, and some other matters, but we are getting to that sort of thing. We are bringing our citizens sometimes to some places hundreds of miles away, and under this law you would bring them for thousands of miles to Kansas City to prosecute them. I do not think it is right. I do not think it ought to be the law, but I do think that the courts have held that it is the law and I think I am bound by it. But I think when the department through their regulations have said that it must be filed in a certain place, I do not think that sometime, a few years later, you can come in and say, 'We didn't mean that; we think it should be filed some place else.'

"Gentlemen, your regulations provided that the returns for 1947 and 1948 should be filed in New York City. You say you have moved the Processing Division out here. That is true and the Government says here that when they processed them then they sent them back to the Collection District.

"This Court is only bound by the law as it is written. This Court must take judicial notice of the rules and regulations of the Bureau of Internal Revenue, and every other bureau, when they are published in the Federal Register, and when that has been done, then that is the law and

is binding upon every citizen of the United States. It is binding upon the Court and it is not binding until that is done. Actual notice is not sufficient.

"So I do not think that you have any right to say that a man who under the law was required to file his return in New York on February 15, 1948, can in 1951 be indicted for failure to make that same return in Kansas City. I just don't believe, gentlemen, that that is the law, that you can shift your venue by any will or whim or caprice, and I don't mean that disrespectfully of anyone. I don't believe you can do that and that is going to be the ruling of this Court and the Motion to Dismiss will be sustained as to that count, Count I, because in the opinion of the Court it was required to be filed in New York, and the order did not become a law until after the filing time had expired requiring it to be filed in Kansas City, although the processing district was here and had been here for quite some time.

"Now we get around to the other two counts. I cannot agree with Mr. Schenker that this is strictly a civil proceeding. I think the statute required that the form be filed. The purpose of it is obvious and always has been that we have, of course, a great many citizens who may not be in such economic condition as to require the filing of a return under normal conditions. It is difficult to check up on them. Therefore, this statute was passed, but those who are paying money to other persons

should report it so that the Government may know who is receiving income. Of course, we realize that in certain cases it may be a little bit of a hardship, but it is nevertheless the law. I can think of many, many instances where it might be disastrous, both to the recipient and to the payer of the money, to have to account for it, but, nevertheless, it is the law and the Government has a right to have that information, and if they are going to require that sort of thing, then they should do whatever is necessary to do about it. I think the statute does require a return and I think there is a criminal penalty for failure to comply with it, failure to make a return, and I think a 'return' means any return that is required by the statute, a declaration or whatever it is, and that failure to do so would subject the violator to the penalty.

92 "With that in mind, the *Motion to Dismiss* will be overruled as to Counts II and III.

"What comes next, gentlemen? Has there been a plea in this case?

"MR. SCHENKER: I was just wondering if the defendant had been arraigned.

"THE COURT: I don't think he has.

"MR. SCHENKER: I don't think so.

"THE COURT: We had better have the arraignment. I think there has been no plea in either this case or the other case.

"MR. SCHENKER: I am sure there wasn't any in the other one.

"THE COURT: I don't think there has been any in this case. I think you were here.

"MR. SCHENKER: That is right.

"THE COURT: And got leave to file these motions and they have been going along here for a long period of time, through the fault of no one.

"MR. SCHENKER: That is correct.

(Whereupon, discussion was had off the record.)

"THE COURT: If your client will come forward.

"MR. SELTZER: Could the record show that the Government excepts to the ruling?

"THE COURT: All exceptions are saved.

(Whereupon, discussion was had off the record.)

"THE COURT: What is the plea of the defendant?

"MR. SCHENKER: Not guilty, if the Court please.

"THE COURT: A plea of not guilty.

"Now, gentlemen, about a trial. You have some motions to make more definite and certain and I think, gentlemen, that the indictment complies with the law. We realize that under the New Rules of Criminal Procedure it does not require very much to make an indictment good. There may be some information that you are entitled to and, if the Court can simply express his opinion about it I think the Government is not required to give up its evidence as such, but such books and records and certain things that were taken from the defendant, certainly you have

a right to them and to see them, and there may be some other things.

"MR. SCHENKER: I might say this in order to be perfectly fair with the Court, that our Motion for Discovery and Inspection was premature excepting I wanted to get all our motions in because in order to really come within the terms of U. S. versus Bauman, we should strictly also have filed a subpoena duces tecum but we could not have done so without knowing what they would file.

"THE COURT: I think that you probably have as much information and know whatever they know about it, and if they have taken any books and records away from your client, you are certainly entitled to them.

"MR. SCHENKER: I don't believe that condition exists.

"THE COURT: Whatever they have done in the preparation, I think you are not entitled to see. I am rather liberal in my views about these matters and yet I do not think the defendant is entitled to search the soul and conscience of his opposition too deeply.

"Now, what about a trial of it, gentlemen?"

"MR. SCHENKER: Before that question may I call to the Court's attention—I believe you indicated I was thinking in terms of a bill of particulars.

"THE COURT: If there is a Motion to Dismiss the indictment that I haven't passed on, it will be done.

"MR. SCHENKER: It was passed on. The only thing I was thinking about a bill of particulars is that there are certain matters which we can raise if the Government were to file a bill of particulars which appears to me would undoubtedly go a long way towards expediting the question of a trial. I indicated to the Court before that when the criminal information was filed the Government alleged that these payments were gains as a result of gambling activities substantially and I believe they also indicated something on the question of a demand. Well, the question of a demand is not pertinent now in view of the Court's ruling, but the question as to the source or the reason for those payments, and so forth, that is pertinent and material. For instance, it would certainly give the position of the Government whether it is their contention that payments made as a result of gambling ventures were covered by 147. It would also give this question and have the Government state whether it is a net proposition over the end of the year, the gains and losses with the final result or whether it is simply regardless of the losses by the person that made the wager.

"THE COURT: I can give you my thought about it very quickly. Would you say the demand is out of the situation so far as the defendant in this case is concerned?—And may I assume for the purpose of this discussion—it is not on the record—I assume that all these transactions were based upon gambling.

• MR. SCHENKER: That is a proper assumption.

• THE COURT: So I may assume that. The Court never likes to assume anything that may get anyone in trouble.

• MR. SELTZER: Payments were made in connection with gambling transactions.

• THE COURT: Now, I thought, gentlemen, that any sum paid to any individual as a result of a wager would under the statute have to be returned. Now, whether that is a gain or a loss, certainly it is a gain to the—shall we say the defendant in this case? If I take myself as an example, if I bet \$1,000.00 and as a result of that I get \$600.00 back, not the \$1,000.00, but \$600.00 in addition.

• MR. SELTZER: That is right, \$1,600.00.

• THE COURT: \$1,600.00 back. Then that \$600.00 is reported, must be reported so far as the other individual is concerned. It may be a gain or maybe it isn't. He has to account for that, but any amount he pays in excess of the amount that was deposited with him for the purpose of making a wager would have to be returned. That would be my legal conception.

• MR. SCHENKER: That would be correct; your conception would be correct regardless of the fact that perhaps the transaction involved one day where there was a payment of say \$600.00 and the next day that same \$600.00 came back.

• THE COURT: That is right.

• MR. SCHENKER: That would still be the Court's opinion.

"THE COURT: That is my opinion whenever he pays him \$600.00 on a gambling obligation, the amount of \$600.00.

"MR. SELTZER: More than \$600.00 in the year.

"THE COURT: He has to account for ~~it if he~~ pays him more than \$600.00, and, of course, he wouldn't pay him \$600.00 in addition to the amount of the wager; if it would appear in evidence I came in here and bet \$1,000.00 and I got a check back for \$1,000.00. That was simply the amount that I wagered and for some reason I didn't win anything, but if I win more than \$600.00, then it has to be reported.

"MR. SELTZER: Even though you lost the same amount of money to the same man the next day.

"THE COURT: That is right. In other words, if he has paid him that amount of money, that is a matter of adjusting. That is the very purpose of this thing. This statute was to keep track of it and I can see how it is pretty tough on a business of this kind.

95 "MR. SCHENKER: I don't want to belabor the situation but it would be most interesting if the Government would attempt to enforce that law on dice games that a man pay or wager his money some forty times within a period of ten or fifteen minutes, and it would be most interesting to attempt to enforce it.

"THE COURT: It is like a transaction that multiplies itself so often. I have sat around the counsel

table many, many days discussing with some of the folks who had a little more advanced ideas about imposing a tax on gambling, and after days of discussion, nobody has ever come up with any substantial or sound plan for taxing gambling so you get the money out of it that I have ever seen or heard of, except at the race track where it is out in the open. I think that is the law, gentlemen. That is the intention of the statute and that would be the ruling of the Court if I were to charge the jury. I would say to them that that was my opinion of the law that any amount of \$600.00 and up would have to be reported. Whether he lost it the next day would be of no concern, he would have to account for that. That is, the individual to whom it is paid and not the one who is required to make the return.

"That is my thought and that will be my thought unless there is something to the contrary because I don't know of any law—

"MR. SCHENKER: We haven't been able to find any.

"THE COURT: We are kind of pioneering this thing.

"MR. SCHENKER: We haven't been able to find any and I was just wondering whether we should not have attacked this law because it is just incapable of being enforced as to all things.

"THE COURT: I think there are a number of things like that, but it is not for this Court to say.

We have had some others in the past that were unenforceable but they were on the books and they had to be looked after. I am not critical of the law. We are just making a practical situation. I think it is a perfectly good law and one that has resulted in the Government's ability to collect taxes where they otherwise might not have obtained them.

"So that brings us back to where we are going and you may not be back here again for sometime. If we can agree on some time to set the case or if in the meantime we have to pass upon some formal matters, we can do that.

"MR. SCHENKER: Very well.

"THE COURT: But there is not very much here that I see where a bill of particulars will aid you.

"MR. SCHENKER: Frankly, that practically answered the point. While I am objecting and saving exceptions, it does enlighten me on the matter that I wanted to get at, and I am very appreciative to the Court for that.

"THE COURT: If I should change my mind about the situation, I think I should advise counsel on both sides.

96 "MR. SCHENKER: Those are the things that I wanted to raise and there was no way I could raise them as the indictment stood.

"THE COURT: All right.

(Whereupon, discussion was had off the record, at the conclusion of which the Court announced.

that said case would be set for trial on November 17, 1952.)

"THE COURT: Let the record show that the bill of particulars is overruled. That does not mean, gentlemen, that if some matter should develop in the meantime I am going to preclude you from filing another motion.

"MR. MURPHY: That still leaves the motion for discovery but I believe Mr. Schenker said that might be premature.

"MR. SCHENKER: I was going to make this suggestion, as to the motion for discovery, if the Court did not rule on it or would just pass it.

"THE COURT: I am willing to pass it now because if when you get into the preparation of it there is anything that you gentlemen cannot agree on, either that the Government has and that you want, you can refer it to the Court and the Court can pass on it. I think that is the better way to handle it.

"MR. SELTZER: So there would not be any further argument on it?

"MR. SCHENKER: No.

"THE COURT: You gentlemen are not going to have any difficulties.

"MR. SCHENKER: I am perfectly willing to admit that my motion is premature at this time, my Motion for Discovery.

"THE COURT: Let the Motion for Discovery and inspection remain on the docket, just make no

order about it. Just leave it undisposed of by failure to mention it.

"Gentlemen, I want to congratulate both of you on the thoroughness with which you have briefed this matter and gone into a difficult situation. It is a new situation, as I see it.

"MR. SCHENKER: Thank you very much.

"THE COURT: You have both done a splendid job and represented your clients with fidelity.

"MR. SCHENKER: Thank you, your Honor.

"MR. SELTZER: Thank you, sir."